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No. _____

In The

# Supreme Court of the United States

October Term, 1988

FRANK TILLER,

*Petitioner,*

v.

WILLIE ALBERT FLUDD,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION PRESENTED

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that a public prosecutor was prohibited from using the state's allotment of peremptory strike in a racially discriminatory manner during the jury selection process in criminal cases.

The question presented is whether this holding should be applied to jury selection procedures in civil cases.*

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*The parties to the proceeding in the United States District Court were petitioner herein; J. B. Dykes; the respondent herein; Robert C. Daniel, Jr., attorney for petitioner and Dykes; John D. Batson and Sam G. Nicholson, attorneys for respondent.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Frank Tiller, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion for the United States Court of Appeals for the Eleventh Circuit, entered in the above styled proceeding on January 17, 1989. That Court denied a timely filed motion for a rehearing en banc on March 29, 1989.

## OPINIONS BELOW

The opinion for the Court of Appeals for the Eleventh Circuit, denominated *Fludd v. Dykes,* is reported at 863 F.2d 822, and is reprinted in the index hereto, page 1a infra.

There was no written opinion issued in the United States District Court for the Southern District of Georgia (Bowen, D.J.) wherein this case was tried. As has been recited in the opinion of the Court of Appeals, this case was tried to a jury and a verdict was returned in favor of the petitioner herein.

## JURISDICTION

The respondent, Willie A. Fludd, brought this suit in the federal district court for the Southern District of Georgia, invoking federal jurisdiction pursuant to 42 U.S.C. §1983, alleging that the petitioner and another defendant not herein involved, J. B. Dykes, violated his civil rights. The complaint was filed on February 17, 1983, and the defendants filed answers on March 10, 1983. On October 14, 1986, the parties in this case struck a jury and the case proceeded to trial. During the course of this trial, the district court granted a motion for a directed verdict in favor of the defendant J. B. Dykes for reasons not germane to the subject matter of this petition. On October 17, 1986, the jury returned a verdict in favor of the petitioner herein, Frank Tiller. This verdict was reduced to judgment by the trial court on October 23, 1986.

The respondent appealed this judgment to the Eleventh Circuit alleging numerous errors committed by the

presiding district court judge and on January 17, 1989, that court reversed the decision of the trial court as to the petitioner and remanded the case back to the trial forum for further proceedings consistent with its opinion. It held to be erroneous the finding of Judge Bowen that *Batson v. Kentucky*, 476 U.S. 79 (1986) is inapplicable to the manner in which peremptory strikes are exercised in a civil case tried in federal district court. It further determined that all of the other allegations of error made by the respondent were without merit. The panel, therefore, returned this case to the trial court in order to allow it to hold an evidentiary hearing on the issue of whether or not the petitioner had exercised his peremptory strikes in a racially discriminatory manner.

The jurisdiction of this court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. §1254(1).

## STATUTE INVOLVED

28 U.S.C. §1870 Challenges.

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

## STATEMENT OF THE CASE

This case arose out of a police-citizen encounter. The respondent was shot by a deputy sheriff of Richmond County, Georgia, while the deputy was attempting to take a suspected narcotics trafficker into custody. The respondent contended that the officer's conduct, in shooting him, constituted an unreasonable seizure and, also, a denial of substantive due process, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, and he sought money damages against the officer and his supervisor, the Sheriff of Richmond County, under 42 U.S.C. §1983 (1982). After the parties joined issue and completed their discovery, the case proceeded to trial.

A jury consisting of six persons chosen from a venire of fifteen persons, tried the case. Each party was allowed three peremptory challenges to the twelve members of the venire proposed for the six positions on the jury; in addition, each party could make one peremptory challenge to the three members of the venire proposed for one alternate juror position. Following a voir dire examination conducted by the court and counsel, the parties struck the jury, exercising all of their peremptory challenges in the following manner. Persons numbered one through twelve on the venire list were tendered to plaintiff; he struck one person, then tendered the eleven remaining to the defendants. The defendants struck one person and tendered the ten remaining to plaintiff. This process continued until each side had exhausted its three peremptory challenges; the six venire persons remaining constituted the jury. The parties then moved to the three

venire persons proposed for the alternate position and, after striking two of them, selected the alternate.

At the conclusion of this selection process, but before the jury was sworn, the respondent drew the court's attention to the *Batson* decision and asked the court to require the petitioner's attorney to explain why he had struck two blacks from the venire. After a brief colloquy with counsel, the court ruled that *Batson*'s holding, being "limited to criminal cases," was inapplicable and denied the respondent's request. The respondent, to preserve the issue for appellate review, then moved the court to discharge the panel and to begin the jury selection process anew. The trial court denied his motion.

## REASONS FOR GRANTING THE WRIT

The issue presented by this petition is one of utmost importance for every member of the bench and bar who regularly litigates civil cases in the federal court system and indeed in every court throughout the United States. While there is not a plethora of appellate decisions dealing with the application of *Batson v. Kentucky*, 476 U.S. 79 (1986) (hereafter referred to as *Batson*, *Batson v. Kentucky*, or *the Batson decision*) to the manner in which peremptory strikes are executed during the course of a civil trial, there are enough recent decisions concerning the issue to clearly indicate that this is a matter with which trial and appellate courts will have to deal in the future. Consequently, this Court should speak clearly on this issue in a timely manner so that both the federal and state courts will have guidance in dealing with this thorny problem

when they are confronted with it as they invariably will be.

The United States Court of Appeals for the Fifth Circuit in the case of *Edmonson v. Leesville Concrete Company*, 860 F.2d 1308 (5th Cir. 1988) has expressly held that *Batson* is applicable to civil cases. Its reasoning for so holding was similar to that employed by that of the Eleventh Circuit in the case sub judice. Counsel for the petitioner has been informed that the Fifth Circuit has granted rehearing en banc and that that case was reargued before the full bench of the Fifth Circuit on June 19, 1989. On the other hand, while not directly confronting the question of the applicability of *Batson* to civil cases, the United States Court of Appeals for the Eighth Circuit has expressed a disinclination to apply *Batson* in the civil litigation context. *Swapshire v. Baer*, 865 F.2d 948, 953 (8th Cir. 1989); *Wilson v. Cross*, 845 F.2d 163, 164-5 (8th Cir. 1988)

The federal district courts are clearly split on the issue of whether *Batson* applies to civil cases. In *Maloney v. Washington*, 690 F.Supp. 687 (N.D.Ill. 1988) and *Clark v. City of Bridgeport*, 645 F.Supp. 890 (D. Conn. 1986), federal district courts in Illinois and Connecticut ruled that *Batson* was applicable. On the other hand, in *Esposito v. Buonome*, 642 F.Supp. 760 (D. Conn. 1986) the presiding judge refused to apply *Batson* in such a manner as to inhibit the manner in which the parties were exercising their peremptory strikes.

On the state level, there has not yet been a large number of cases dealing with this issue. One of Florida's several courts of appeal has implicitly determined that

*Batson* applies to civil cases. *Smith v. Coastal Emergency Services*, 538 So. 2nd 946 (Fla.App. 4 Dist. 1989). Contrawise the Court of Appeals for the State of Georgia has expressly ruled that *Batson* does not govern the exercise of peremptory strikes in civil cases in that state. *Banks v. Lewis*, 187 Ga. App. 218, 369 S.E.2d 537 (1988)

It is the carefully considered position of the petitioner that this Court should grant certiorari to the Eleventh Circuit Court of Appeals in this case, review that court's decision, reverse it and expressly state that the *Batson* decision does not govern in any way the course of civil litigation in federal trial courts. The foremost reason why this Court should so hold is that the functions of a public prosecutor, whose actions and procedures in conducting jury selection *Batson* seeks to govern, are wholly different and apart from the obligations and duties of the civil trial advocate in seeking to effectively represent his client.

This Court has expressly held that a public prosecutor has an overriding obligation to be fair and just, a duty that transcends his usual function of seeking to obtain convictions in criminal cases. *Berger v. United States*, 295 U.S. 78 (1935), overruled on other grounds, *Stirone v. United States*, 361 U.S. 212 (1960). Consequently, even as he seeks to effectively represent whatever sovereign authority that has either appointed or elected him to the position that he fills, he must also seek to advance the interest of the criminal accused in receiving a fair trial. This obligation is manifest in such decisions as *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, which require prosecuting attorneys to turn over favorable

information to a criminal accused and/or his representative, and myriad other decisions rendered by this Court which strictly delineate the boundaries within which a prosecutor can argue for the conviction and punishment of a criminal accused. When this fundamental obligation of a public prosecutor is viewed within this context, the holding of *Batson v. Kentucky* is certainly plausible, even when that decision is viewed against the backdrop of the numerous administrative difficulties that it imposes upon trial courts in seeking to adhere to its standards and the obvious manner in which it impairs the exercise of peremptory strikes by the prosecution in certain criminal cases.

In civil cases, however, the procedural constraints that bind a public prosecutor even as he seeks to be a forceful advocate historically have not and should not govern the actions of an attorney as he seeks to effectively represent a civil litigant. While an attorney representing a civil litigant has an ethical obligation to be open, honest and fair with an opposing party, an opposing party's attorney and the tribunal within which he is litigating the matter at issue, his paramount duty is to the client that he represents. "Whatever may be the models that obtain in other legal cultures, the client-lawyer relationship in the United States is founded on the lawyer's virtually total loyalty to the client and the client's interest." Wolfram, *Modern Legal Ethics*, (West 1986) Sec. 4.1. A necessary corollary of this principle is that any duty of fairness and evenhandedness that a civil attorney owes to the opposing party, his counsel, a prospective juror or even the community as a whole is subordinate to this fundamental interest

The application of the *Batson* decision to civil trial proceedings can do nothing other than undermine and subvert the nature of the relationship which a civil attorney must have with his client. While this Court has not had the occasion to broadly define and explicate the procedural rights of civil litigants in the manner that it has those of criminal defendants, it has, nevertheless, held that a civil litigant is entitled to the assistance and representation of counsel. *Goldberg v. Kelly*, 397 U.S. 254, 271-272 (1970); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

Concomitant with the right to counsel are other prerogatives of both the attorney and his client which are necessary to render that right both meaningful and effective. One of the most important attributes of the right to counsel is surely the necessity of allowing both the attorney and client to consult with one another when such consultation may be required during the course of litigation. See *Potashnick v. Port City Construction Company*, 609 F.2d 1101, 1117-1119 (5th Cir. 1980), cert. denied, 449 U.S. 820 (1980). (Due process clause of Fifth Amendment to the United States Constitution requires that a litigant be allowed to confer with his attorney during breaks and recesses in the course of the litigant's trial testimony.)

The petitioner further asserts that the due process right to counsel also entails the inviolability of communications between attorney and client insofar as such communications are directed toward preparation for trial and the formulation of trial strategy. Although this Court has not heretofore given constitutional protection to any aspect of the attorney-client privilege, it has clearly recognized that such a privilege is essential to the formation

and functioning of the relationship between an attorney and his client. *Upjohn Company v. United States*, 449 U.S. 383 (1981). The United States Court of Appeals for the District of Columbia Circuit, recognizing the important nexus between a civil litigant's right to counsel and access to the courts, and the existence of an attorney-client privilege, has expressly held that the privilege is entitled to constitutional protection. *Martin v. Lauer*, 686 F.2d 24, 32-33 (D.C. Cir. 1982).

Inextricably interwoven with the right to counsel and the subsidiary right of counsel and client to confer with each other in circumstances of privacy, is the attorney's "work product" privilege. This privilege recognizes that for a person to be afforded effective assistance of counsel his attorney must be allowed some degree of privacy, solitude and the means by which he can correlate and memorialize his thoughts about how to best represent his client without having to suffer intrusion or harassment from the opposing party, or, indeed, from the presiding judge. This privilege was first set forth and explained in some detail by this Court in the well-known case of *Hickman v. Taylor*, 329 U.S. 495 (1947) and has since been more fully explicated by decisions such as that of the United States Court of Appeals for the Fourth Circuit in *Duplan Corporation v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir.), cert. denied, 420 U.S. 997 (1974) and by the United States Court of Appeals for the Third Circuit in *Sporck v. Peil*, 759 F.2d 312 (3rd Cir. 1985). Most recently the privilege has been reaffirmed and upheld by this Court in *Upjohn Company v. United States*, supra.

Since some minimal work product privilege is absolutely essential for a civil trial litigator to prepare his case

and to, therefore, pursue his occupation, it would appear that any fundamental abridgement of the privilege would constitute a violation of the attorney's due process right to pursue his calling and occupation. *Truax v. Raich*, 239 U.S. 33, 41 (1915). Thus it appears that the Due Process Clause of the Fifth Amendment to the United States Constitution must be deemed to protect a civil litigant's right to counsel, the basic rudiments of an attorney-client privilege and an elemental work product privilege for the attorney, in consultation with his client, to formulate basic trial strategy in order to most effectively advance the cause of the client in the trial forum. The formulation and execution of trial strategy necessarily includes the all important task of counsel in jury selection which entails the effective use of peremptory strikes. "Systematic jury work is an overall approach to trial preparation for any jury trial." *Jurywork: Systematic Techniques*, The National Jury Project, Inc. (Clark Boardman, 2d Ed.), page 1-1.

The application of *Batson v. Kentucky* to a civil litigant in such a manner that he is required to advance "racially non-discriminatory reasons" for exercising any or all of his peremptory strikes necessarily violates and negates the civil litigant's due process right to counsel, his right to confer with his attorney, and the right of both the client and the attorney to formulate the trial strategy in such a manner as to exert their best, good faith effort to win the case within the context of our longstanding and hallowed adversary system. The petitioner can conceive of no way in which such explanations can be tendered to opposing counsel and to the trial court without necessarily revealing important aspects of his trial strategy as well as information in the nature of work product. It is difficult

for the petitioner to conceive how an attorney called upon to respond in such a manner could do anything other than reply in such a manner as would publicize for everyone in the courtroom to hear his thoughts and mental impressions about the case which he could otherwise withhold under the *Hickman v. Taylor* doctrine. The danger that the essence and substance of confidential attorney-client communications will be revealed during the course of such a response is only slightly less probable. The conclusion necessarily follows that such an application of *Batson v. Kentucky* in this context necessarily infringes upon the due process right of a civil litigant to counsel and the other rights appurtenant thereto; and it also violates the fundamental right of an attorney to pursue his occupation in that it greatly inhibits his right to effectively and zealously advance his client's cause during a crucial stage of trial proceedings, the important matter of jury selection.

More important, however, is the invidious effect that applying *Batson v. Kentucky* in the civil context has on an attorney's First Amendment rights of freedom of speech, freedom of association and his right to privacy. In 1943 this Court held that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 642 (1943). Yet there can be no doubt that *Batson v. Kentucky* does purport to impose an "orthodox" framework within which an advocate must exercise his

peremptory strikes or risk being labeled a bigot or a fraud or perhaps both.

When an attorney first comes into contact with a panel of prospective jurors, certainly the first characteristic that individualizes each one of them is their racial or ethnic background so far as such is readily discernible. In formulating a strategy for exercising his strikes, counsel undoubtedly considers any number of facts that he can discern or otherwise knows about the prospective jurors and it would certainly be, to say the least, difficult to believe that he does not take their individual racial and ethnic backgrounds into the sum of his calculations in deciding how to exercise his strikes. In such circumstances, it should be obvious that even the attorney who must make the decision as to who he will peremptorily remove from the jury panel will have a difficult time in explaining what particular factors about a member of the venire predominated over other personal characteristics in making a decision whether or not to accept that person. Intuition is really an indispensable element in the exercise of a peremptory challenge. "The peremptory serves another major function, however . . . That function is to give effect to a litigant reaction that is purely personal - an intuitive reaction, for which perhaps the best word is that used by both Coke and Blackstone: 'Dislike'." "Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury In a Criminal Trial", 102 *Harv.L.Rev.* 808, 829 (1989).

The proposition cannot reasonably be contested that an attorney's preconceived notion of what factors constitute a "good" juror for the cases that he has to try are necessarily based on political, sociological, philosophical

and even religious beliefs that are deeply ingrained and which may be for all practical purposes immutable. The attorney's conception of who is an acceptable juror is undoubtedly based upon the attorney's knowledge of his own background and personality and his experience in relating to groups of people who seem to share certain common characteristics. A noted expert and commentator on American constitutional law has conceptualized all of these factors about an individual; his background, his belief system and his lifestyle within the term "personhood". See Tribe, *American Constitutional Law (Foundation 2d Ed. 1988)*, p. 1304.

Requiring an attorney to give a "racially neutral" explanation for the manner in which he exercises a peremptory strike and, moreover, attempting to determine whether or not the proffered reason is a "pretext" therefore cannot help but to encroach upon some fundamental constitutional interests that the attorney has every legitimate right to protect. For the nature of the inquiry that he could be subjected to pursuant to the holding of *Batson* is such that it goes to the very heart of who he is as a person. Such inquiry is unquestionably at odds with the fundamental values of the First Amendment to the United States Constitution. "Whatever the combination of paths the mind's contents might have traveled to their destination in a particular individual's consciousness, it is beyond dispute that those inner thoughts and feelings cannot themselves subject a person to *any* (petitioner's emphasis) governmental deprivation of rights or privileges." *Tribe*, supra at pages 1321-1322. Moreover, government does not have the right to assess or control the moral contents of a person's thoughts which is something

that the *Batson* decision unquestionably purports to do. See *Stanley v. Georgia*, 394 U.S. 557 (1969).

This Court has held on numerous occasions that government cannot compel an individual to disclose his political, sociological and philosophical affiliations because such information is obviously the highest and best evidence of an individual's belief system and his innermost thoughts about important, fundamental matters. *Shelton v. Tucker*, 364 U.S. 479 (1960). This Court has, in fact, held that an individual is generally entitled to complete anonymity insofar as knowledge of his beliefs and associations are concerned. *Talley v. California*, 362 U.S. 60 (1960). Furthermore, the First Amendment prohibits government from forcing an individual to do any act or make any declaration which would indirectly and inferentially connect him with any ideology or group, particularly if that ideology or group is unpopular given the tenor of the times. *Lamont v. Postmaster General of the United States*, 381 U.S. 301 (1965).

More recently, this Court has held that "The right to privacy in one's political associations and beliefs will yield only to a subordinating interest of the state that is compelling". *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 92 (1982). With particular reference to an attorney's right to pursue his calling, and in conjunction with the broader First Amendment interest involved, the earlier decision of *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971) speaks with particular force to this concern: "When a state seeks to inquire about an individual's beliefs and associations, *a heavy burden* (petitioner's emphasis) lies upon it to show that the inquiry is

necessary to protect a legitimate state interest." See also *Application of Stolar*, 401 U.S. 23 (1971).

The application of the *Batson* decision to civil cases puts counsel in the dilemma of either allowing people to go on the jury panel that he may in good faith believe are at best indifferent and at worst inimical to him as an advocate and/or to the cause of his client or to personally risk being denominated a racist bigot and perhaps a dishonest person to boot. Insofar as the harm that can arise to counsel on account of such a scenario, the petitioner calls the Court's attention to the fact that it is in these times considered to be actionable defamation to wrongly accuse someone of being a racist. See "Libel and Slander", 50 *Am.Jur.*2d 497, 595, Sec. 94; "Imputation of Allegedly Objectionable Political or Social Beliefs or Principles as Defamation", 62 *A.L.R. 4th* 314, Secs. 11-12 (1988).

Moreover, the stigma that attaches to counsel when he is found to have violated the precepts of the *Batson* decision is compounded when the trial court determines that the explanations for the alleged racially discriminatory misuse of his peremptory strikes were a mere pretext for having engaged in such wrongful behavior. Such a ruling clearly constitutes a finding that the attorney has attempted to perpetrate a fraud upon the court, professional misbehavior which has been condemned by this Court as recently as its holding in *Nix v. Whiteside*, 475 U.S. 157 (1986).

That the petitioner's First Amendment concerns are real and substantial, rather than remote and farfetched, is illustrated by the scenario set forth in *People v. Davis*, 537 N.Y.S.2d 430 (Sup. 1988) wherein the trial court applied

the precepts of *Batson* to the exercise of peremptory strikes by a criminal defense lawyer and in so doing determined that he had used his strikes in a racially discriminatory manner against prospective white jurors. In making this determination, the presiding judge partially relied upon out-of-court statements that defense counsel had made to the effect that blacks had been historically discriminated against by white society and that in his experience, black or other non-white jurors were more likely to be fair to a criminal accused than were jurors of Caucasian extraction.

The court additionally based its holding on its view of a television interview program on which defense counsel appeared and during which he stated "I'd like a third world jury – that's a jury of his peers." While it is obvious from reading this decision that within the context of this case defense counsel did not have any trepidation over openly expressing his racially and ethnically stereotypical views, it is also abundantly clear that the presiding judge relied very heavily on these statements which are, of course, protected speech under the First Amendment, in determining that counsel had exercised his strikes in a racially discriminatory manner.

When a litigant's life and liberty is at stake, as it commonly is during the course of a criminal prosecution, justifiable reasons can certainly be advanced for placing upon the prosecuting attorney the burden of explaining that his peremptory strikes were not utilized in a racially or ethnically discriminatory manner. And, of course, the more that a criminal accused has at stake in a criminal prosecution, particularly in a death penalty case, the greater should be the assurances that no official charged

with the responsibility of conducting such a proceeding is operating out of an invidious, discriminatory motive. *McCleskey v. Kemp*, 481 U. S. 279 (1987).

However, in civil cases a litigant's due process right to the assistance of counsel and the attorney's right to pursue his calling and his First Amendment rights of personhood, privacy and freedom of speech and association mandate that the *Batson* decision be held inapplicable to such proceedings. Any expectancy that a party has in a money judgment or in injunctive relief cannot possibly override such fundamental interests on the part of his adversary and his adversary's attorney. Such a weighing of opposing interests is particularly appropriate when it is considered that peremptory strikes have traditionally been exercised in a manner solely within the discretion of respective counsel and that they are not a constitutionally mandated component of jury selection in civil cases in any event. *Swain v. Alabama*, 380 U.S. 202 (1965), partially overruled in *Batson v. Kentucky*, 476 U.S. 79 (1986); *Hayes v. Missouri*, 120 U.S. 68 (1887).

As for the rights of prospective jurors, petitioner is unaware of any holding by this court that states that a given venireman of any race, creed or color has any constitutionally protected expectancy, in the nature of a civil right, to sit on any given petit jury panel. For this reason his or her interest must necessarily be subordinated to the fundamental interests and rights of litigants and their attorneys noted above.

## CONCLUSION

The issue discussed in this petition is a very important one for everyone who must participate in civil litigation. While this question has not been extensively dealt with just yet in the state and federal courts, the uncertainties created by the *Batson* decision, partly because of some of the broad language included therein, guarantee that it is going to be a continuing issue in civil proceedings. Eventually this Court will have to address this matter and it will greatly facilitate the orderly development of the law if this Court speaks now rather than later. The Court should, therefore, grant this petition for certiorari, review the decision of the Eleventh Circuit involved herein, reverse it and uphold the judgment of the trial court.

Respectfully submitted,

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June 21, 1989

# APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

| | | |
|---|---|---|
| WILLIE ALBERT FLUDD | * | |
| VS. | * | CV183-066 |
| J. B. DYKES, SHERIFF OF RICHMOND COUNTY, GEORGIA AND FRANK TILLER | * | |

# JUDGMENT

(Filed Oct. 23, 1986)

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This action came on for trial before the Court and a jury, Honorable Dudley H. Bowen, Jr., United States District Judge, presiding. The issues having been duly tried and the defendants having moved for a Directed Verdict,

IT IS ORDERED AND ADJUDGED that in accordance with the jury verdict of October 17, 1986 and the order entered on the docket October 22, 1986, judgment is hereby entered in favor of the defendants and against the plaintiff. Costs are hereby assessed against the plaintiff, to be taxed by the Clerk of this Court.

DATED at Augusta, Georgia, this 22nd day of October, 1986.

HENRY R. CRUMLEY, JR., CLERK
UNITED STATES DISTRICT COURT

By: Scarlett B. Collins
Deputy Clerk

APPROVED: Dudley H. Bowen Jr.
DUDLEY H. BOWEN, JR., JUDGE
UNITED STATES DISTRICT COURT

DATED: Oct. 22, 1986

**Willie Albert FLUDD,**
**Plaintiff-Appellant,**

**v.**

**J.B. DYKES, Sheriff of Richmond County, Georgia and Frank Tiller,**
**Defendants-Appellees.**

**No. 87-8244.**

United States Court of Appeals,
Eleventh Circuit.

Jan. 17, 1989.

Black citizen brought civil rights suit against police officer and his supervisor. The jury in the United States District Court for the Southern District of Florida, No. CV183-66, Dudley H. Bowen, Jr., J., returned defense verdict, and the plaintiff appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that when objecting party showed that he was a member of a cognizable racial group and that relevant circumstances raised an inference that his opponent had exercised peremptory challenges to remove members of the objecting party's race from the venire, objecting party made out prima facie case of purposeful discrimination, thus shifting burden to opponent to come forward with neutral explanation for challenges.

Affirmed in part, remanded in part.

Appeal from the United States District Court for the Southern District of Georgia.

Before TJOFLAT and EDMONDSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

During the selection of the jury in this civil rights suit, brought by a black citizen against a police officer and his supervisor, both of whom are white, the defendants peremptorily challenged the two black persons on the venire; as a result, an all-white jury was chosen to try the case. Plaintiff's counsel objected to these challenges on the ground that they were racially motivated and, citing *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), argued that defense counsel had to give a racially neutral explanation for their action or abandon the challenges. The court overruled the objection, holding that *Batson*, which involved a criminal prosecution, has no application in civil cases. The jury subsequently returned a defense verdict,[1] and the plaintiff, hereafter the appellant, took this appeal.

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*Honorable John Minor Wisdom, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

[1] The verdict for the Sheriff of Richmond County, the appellee Dykes, was directed by the district court. The court had concluded, at the close of all of the evidence, that the appellant failed to show that any conduct on the sheriff's part had caused the shooting or any of the appellant's injuries. Appellant contends that the court erred in this ruling. We find no error and accordingly affirm the judgment for the appellee Dykes without further discussion.

We hold that *Batson v. Kentucky* applies in civil as well as criminal cases. The district court thus erred in refusing to consider *Batson's* mandate. We remand the case, as *Batson* requires, so that the district court can determine whether the appellees' attorney challenged the two black jurors because they were black or for some nonracially discriminatory reason.

I.

This case arose out of a police-citizen encounter: the appellant was shot by a deputy sheriff of Richmond County, Georgia, while the deputy was attempting to take a suspected narcotics trafficker into custody. The appellant contended that the officer's conduct, in shooting him, constituted an unreasonable seizure and, also, a denial of substantive due process, in violation of the fourth and fourteenth amendments to the United States Constitution,[2] and he sought money damages against the officer and his supervisor, the Sheriff of Richmond County, under 42 U.S.C. § 1983 (1982). After the parties joined issue and completed their discovery, the case proceeded to trial.

A jury, consisting of six persons chosen from a venire of fifteen persons, tried the case. Each party was allowed three peremptory challenges to the twelve members of the venire proposed for the six positions on the jury; in

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[2] The appellant also contended that the officer's conduct violated appellant's first amendment right to free speech. This claim is patently frivolous and will receive no further discussion.

addition, each party could make one peremptory challenge to the three members of the venire proposed for the one alternate juror position. Following a voir dire examination conducted by the court and counsel, the parties struck the jury, exercising all of their peremptory challenges in the following manner. The persons numbered one through twelve on the venire list were tendered to appellant; he struck one person, then tendered the eleven remaining to the appellees. The appellees struck one person and tendered the ten remaining to appellant. This process continued until each side had exhausted its three peremptory challenges; the six venire persons remaining constituted the jury. The parties then moved to the three venire persons proposed for the alternate's position and, after striking two of them, selected the alternate.

At the conclusion of this selection process, but before the jury was sworn, the appellant drew the court's attention to the *Batson* decision and asked the court to require the appellees' attorney to explain why he had struck the two blacks from the venire. After a brief colloquy with counsel, the court ruled that *Batson*'s holding, being "limited to criminal cases," was inapplicable and denied appellant's request. Appellant, to preserve the issue for appellate review, then moved the court to discharge the panel and to begin the jury selection process anew. The court denied his motion.

In this appeal, appellant presents several grounds for reversal, including his objection to the appellees' challenge of the black venire persons. Only appellant's *Batson* claim is worthy of discussion.

II.

The appellant argues that the appellees' successful use of their peremptory challenges denied him the equal protection of the laws as guaranteed by the due process clause of the fifth amendment.[3] The objection is that a district court denies a black litigant the equal protection of the laws whenever it permits his adversary – whether the government or a private party – to use a peremptory challenge to reduce the black litigant's chances of being tried by a jury containing his racial peers. Implicit in the objection is the notion that were the black litigant white, his adversary could not, and would not, use the peremptory challenge to reduce the white litigant's chances of being tried by a jury containing his racial peers.

It is a fundamental principle of equal protection law that a court cannot grant a white person the right to be tried by a jury containing his racial peers and, at the same time, deny a black person the same right. This principle has been a part of our jurisprudence since the Supreme Court's decision in *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879). In that case, a black man, Strauder, was charged with murder. An all-white venire was summoned for the trial, pursuant to a West Virginia statute that limited jury service to white males. Before the

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[3] The right to the equal protection of the laws expressed in the fourteenth amendment has been found by implication in the due process clause of the fifth amendment, which contains no equal protection clause. *See Johnson v. Robison*, 415 U.S. 361, 364 n. 4, 94 S.Ct. 1160, 1164 n. 4, 39 L.Ed.2d 389 (1974); *United States v. Perez-Hernandez*, 672 F.2d 1380, 1385 (11th Cir. 1982).

process of selecting the jury began, Strauder objected to the State's refusal to accord him the same right it gave to a white accused – the right to be tried by a jury selected from a venire from which his racial peers were not excluded on account of their race. The court overruled Strauder's objection, and he was convicted by the all-white jury.

The Supreme Court of West Virginia affirmed Strauder's conviction. *See State v. Strauder*, 11 W.Va. 745 (1877). The United States Supreme Court, however, set the conviction aside, holding that the state trial court denied Strauder the equal protection of the laws guaranteed him by the fourteenth amendment when it forced him to proceed to trial before a jury drawn from an all-white venire. The Court observed that "[t]he very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine." 100 U.S. at 308. The Court then concluded that Strauder's jury could not have been such a body because the state had barred his racial peers from jury service. The Court went on to say that blacks had to be included among those eligible for jury service if Strauder was to be protected against the racial prejudice that the fourteenth amendment was designed to eliminate:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a

> right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

*Id.* at 309.[4]

Under *Strauder*, the equal protection clause, standing alone, does *not* guarantee a black accused the right to a jury selected from a venire containing his racial peers. Rather, *Strauder* stands for the proposition that the state cannot discriminate against a black defendant by denying him a right it accords a white defendant: the right to be tried "by a jury selected from persons of his own race- . . . without discrimination against his color." *Id.* Implicit in this teaching is the thought that whenever an accused is denied this right, his case is presumptively prejudiced. It is prejudiced because he loses any advantage that he might gain from having his racial peers on the jury or,

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[4] A panel from which black citizens have been excluded by state law would also be proscribed by the sixth amendment, as applied by the fourteenth amendment, which guarantees a defendant a jury drawn from a panel composed of a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S.Ct. 692, 697-98, 42 L.Ed.2d 690 (1975). The sixth amendment was not applicable to the states at the time *Strauder* was decided, which doubtlessly explains why the Supreme Court made no reference to the amendment in its opinion.

conversely, he suffers any disadvantage that might result from having no racial peers on the jury.[5]

In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Supreme Court recognized that an equal protection claim, like that in *Strauder*, might apply to peremptory challenges. In *Swain*, the petitioner, who had been convicted of rape in the circuit court of Talladega County, Alabama, claimed that the trial judge denied him the equal protection of the laws when he permitted the prosecutor to exercise the state's peremptory challenges to rid the venire of blacks because of their race. The jury had been chosen in the same manner as the jury in the instant case: after the court qualified the venire, the parties, exercising all of their peremptory challenges, reduced the venire to twelve, the required number of jurors. During this process, the prosecutor

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[5] The sympathy that a racial peer may have for the accused – which a reviewing court must presume to exist if it is to find that the exclusion of racial peers from jury service materially prejudiced the accused's case and thereby tainted the verdict against him – cannot, however, be used as a reason for peremptorily challenging that racial peer:

> Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the Jurors' race.

*Batson*, 476 U.S. at 97-98, 106 S.Ct. at 1723 (citation omitted).

used his peremptory challenges to strike all six blacks on the venire.

After the jury of twelve had been chosen, the petitioner moved the trial court to disqualify the jury on the ground that the prosecutor, in exercising the state's peremptory challenges, intended to, and did, deprive the petitioner of the possibility of having any blacks empaneled to try the case. The petitioner argued that if the court permitted the case to go to trial with a jury so chosen, he would be denied the equal protection of the laws.

In order to establish his equal protection claim, the petitioner cited two pieces of circumstantial evidence as proof of the prosecutor's discriminatory intent: (1) the prosecutor's peremptory challenge of all the black venire persons in the petitioner's own case, and (2) the state's historic practice of using peremptory challenges to strike all blacks who had been summoned during the previous twelve years to try criminal cases in Talladega County. The state, responding, contended that an inference of discriminatory intent could not reasonably be drawn from this evidence; the trial judge agreed, and denied the petitioner's motion.

The Supreme Court refused to disturb the petitioner's conviction. In reviewing the evidence to determine whether the petitioner had proven that the prosecutor had purposefully discriminated against the black members of the venire on account of their race, the Court disregarded the probative value of the petitioner's first piece of circumstantial evidence. The Court did so by presuming that the prosecutor, in exercising the state's

peremptory challenges, was "acting on acceptable considerations related to the case he [was] trying, the particular defendant involved and the particular crime charged." *Id.* at 223, 85 S.Ct. at 837. The Court found that this presumption was warranted "[i]n light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial." *Id.* at 222, 85 S.Ct. at 837. In the Court's view, it was inappropriate to examine the prosecutor's reasons for the exercise of his challenges in any given case:

> The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with [the] peremptory challenge system as we know it.

*Id.*

After *Swain*, a black accused had to rely on circumstantial evidence concerning the prosecutor's conduct in *other* cases to prove that the prosecutor's purpose in challenging black venire persons was to discriminate against them on the basis of race. Specifically, the accused had to show that the prosecutor:

> in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or the victim . . . , [had been] responsible for the removal of Negroes who [were] selected as qualified jurors by the jury commissioners and . . . survived challenges for cause, with the result that no Negroes ever serve[d] on petit juries. . . .

*Id.* at 223, 85 S.Ct. at 837. According to the *Swain* Court:

> In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, . . . the purpose of the peremptory challenge [has been] perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well [have been] overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

*Id.* at 223-24, 85 S.Ct. at 837-38. Thus, in *Swain*, the Supreme Court recognized the possibility that the use of peremptory challenges could violate the equal protection clause; the accused, however, faced a crippling evidentiary burden to establish such discrimination.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court reassessed *Swain's* holding and the rationale on which it was based. The Court initially reconsidered whether the prosecutor's striking of an accused's racial peers from a venire could be used as circumstantial evidence of the prosecutor's discriminatory intent. The Court noted that "peremptory challenges . . . permit[] 'those to discriminate who are of a mind to discriminate,' " 476 U.S. at 96, 106 S.Ct. at 1723 (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)), and recognized that in some cases the prosecutor's exercise of peremptory challenges, standing alone, might permit an inference of purposeful

discrimination. *See id.* at 96, 106 S.Ct. at 1722-23. In such cases, the Court held, immunizing the prosecutor from any inquiry into the motivation for his strikes might deprive the accused of a chance to establish that the strikes were racially motivated; a constitutional violation might therefore go unredressed. The Court consequently reversed its position in *Swain*, and held that trial judges, in deciding the merits of an accused's equal protection claim, should consider any inference of discriminatory motivation that might attend a prosecutor's exercise of his peremptory challenges.

The Court then considered the procedure that the courts should follow in addressing an accused's claim that a prosecutor is using his peremptory challenges in a discriminatory manner. The Court held that if, at the time the prosecutor's peremptory strike is questioned, the circumstances raise the inference that the strike has been made for the purpose of ridding the venire of the accused's racial peers, the trial judge must require the prosecutor to state the reason for the strike. The prosecutor, in turn, must "articulate a neutral explanation [for the peremptory challenge] related to the particular case to be tried" or abandon the strike, *id.* at 98, 106 S.Ct. at 1723; the mere denial of a discriminatory motive, or an affirmation of prosecutorial good faith in exercising individual strikes, however, does not suffice as a neutral explanation. *Id.* at 97, 106 S.Ct. at 1723. If the prosecutor makes a satisfactory explanation, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98, 106 S.Ct. at 1723.

We are convinced that the appellant in this case would have a valid equal protection claim under *Batson* if this case had arisen in the criminal context.

III.

To establish a violation of equal protection, a litigant must demonstrate that the state, and not a private individual, was the source of the purposeful discrimination. In the context of a criminal case, such state action is obvious, because a representative of the state – the prosecutor – is exercising the peremptory challenge. In the civil context, however, there is no prosecutor; the person utilizing the peremptory challenge is the opposing litigant – generally a nonstate actor. The appellees therefore maintain that the equal protection clause is inapplicable to a civil suit. We disagree.

When blacks are excluded from jury service on account of their race, the Supreme Court has long recognized that the discriminatory actor is the trial court – even when the decision to exclude blacks may have originated in another state entity, such as the legislature. *See Strauder*, 100 U.S. at 312 ("There was error . . . in [the trial court's] overruling [of Strauder's] challenge to the array of the jury, and in refusing to quash the panel."). Thus, in *Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667 (1879), the Supreme Court noted that even though the officer charged with assembling the venire may have violated state law by excluding blacks, it should be assumed that the trial judge would redress the wrong. If not, and "the accused is deprived of the right [to have blacks on the

venire], the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced." *Id.* at 322. The Court made the same observation in *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567 (1880), another case in which blacks were deliberately excluded from the venire by the state officials charged with selecting venires, holding that "the court erred in overruling the motions to quash the indictment and panel of jurors," *id.* at 394, and that:

> the refusal of the State court to redress the wrong [committed by those officials charged with the selection of the venire] was a denial of a right secured to the [defendant] by the Constitution and laws of the United States. Speaking by Mr. Justice Strong, in *Ex parte Virginia*, [100 U.S. 339, 347, 25 L.Ed. 676 (1879),] we said, and now repeat, that "a State acts by its legislative, its executive, *or its judicial authorities*."

*Id.* at 397 (emphasis added).

Thus, until the trial judge overrules a party's objection to the racial composition of the venire, the law treats any previous decision on the part of a state entity to discriminate as harmless, insofar as the objecting party is concerned. The trial judge's decision – to proceed to trial, over the party's objection, with a jury selected from the venire on the basis of race – is the one that harms the objecting party. In overruling the objection, which informed the court that the peremptory challenger may be excluding blacks from the venire on account of their race, the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes. Because the trial judge constitutes the discriminatory state actor under the equal protection clause, we conclude

that there is no constitutional bar to the application of *Batson* to a civil suit.

IV.

Having found that the equal protection clause is applicable to civil suits, we must still determine what analytical framework is applicable: that of *Swain* or *Batson*. If *Swain*, rather than *Batson*, provides the standard for an equal protection challenge in civil cases, the district court's denial of appellant's motion to disqualify the jury was correct. Appellant's proof failed to satisfy the *Swain* standard, because appellant did not establish that in other cases appellees, or their counsel, had, through the exercise of peremptory challenges, deprived their black opponents of any chance of having blacks sworn as petit jurors.

We believe, however, that the policies underlying the Supreme Court's decision in *Batson* are equally applicable in the civil context. As the Court observed in *Batson*, there are times when a party has enough peremptory challenges to remove all of his adversary's racial peers from the venire and indeed exercises them for the purpose of obtaining a petit jury that may have a greater sympathy for him than for his adversary. This situation obviously arises in the civil context as well. Nor can we perceive any distinction in the harm to the individual's constitutional rights. Finally, we see no reason why a civil litigant would be unduly prejudiced by explaining the purpose of a strike where the circumstantial evidence indicates that he made it for a discriminatory purpose.

We therefore hold that *Batson* applies in civil cases. Accordingly, when the objecting party shows that "he is a member of a cognizable racial group" and that the "relevant circumstances raise an inference" that his opponent "has exercised peremptory challenges to remove from the venire members of [the objecting party's] race," the objecting party has made out a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723. Once this prima facie showing is made, "the burden shifts to [the opponent] to come forward with a neutral explanation for [the challenges]." *Id.* at 97, 106 S.Ct. at 1723. The "explanation need not rise to the level justifying exercise of a challenge for cause," *id.*; rather, it need only be "a neutral explanation related to the particular case to be tried." *Id.* at 98, 106 S.Ct. at 1723.

V.

As in the case before us, the trial judge in *Batson* did not require the prosecutor to explain why he had struck the blacks. On certiorari, the Supreme Court recognized that the relevant circumstantial evidence before the trial judge may not have been sufficient to permit the inference that the prosecutor had struck the blacks on account of their race and thus to require an explanation. The record before the Court contained only the words spoken – by the attorneys, the venire persons, and the trial judge – during the jury selection process; it did not disclose other evidence, such as the demeanor of the venire persons and the accused during the conduct of the voir dire

examination,[6] that may have had a bearing on the prosecutor's motives. The Court therefore remanded the case to the trial court with the following instruction: "[i]f the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action- . . . petitioner's conviction [must] be reversed." *Id.* at 100, 106 S.Ct. at 1725.

Like the record in *Batson*, the record of the jury selection process in this case contains nothing more than the utterances of counsel, the venire persons, and the district court. Whether those utterances, in the light of other relevant evidence not revealed in the record, made out a prima facie case that appellees purposefully discriminated against the appellant by striking the blacks from the venire is a matter for the district court to decide. We therefore remand the case for further proceedings on this issue. If the district court concludes that appellees purposefully discriminated against the blacks they challenged, and appellees' counsel does not come forward with a neutral explanation for his action, the appellant must receive a new trial. As we have noted, see *supra* note 1, the court properly instructed a verdict in favor of the

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[6] The transcript of the voir dire examination of the venire does not usually disclose such things as the accused's eye contact with members of the venire and their expressions in response. These are matters the attorneys often take into account in exercising their peremptory challenges. They are also matters the trial judge may consider in deciding whether the accused – or, in this case, a civil litigant – has made out a prima facie case, under *Batson*, of purposeful discrimination in his adversary's exercise of a peremptory challenge.

appellee Dykes; accordingly, if a new trial is granted, it shall be against the appellee Tiller only.

VI.

The judgment of the district court is affirmed as to the appellee Dykes. As to the appellee Tiller, the case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART; REMANDED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 87-8244

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D.C. Docket No. 183-66

WILLIE ALBERT FLUDD,

Plaintiff-Appellant,

versus

J. B. DYKES, Sheriff of
Richmond County, Georgia and
FRANK TILLER,

Defendants-Appellees.

---

Appeal from the United States District Court
for the Southern District of Georgia

---

Before TJOFLAT and EDMONDSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of

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*Honorable John Minor Wisdom, Senior U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

the said District Court in this cause be and the same is hereby AFFIRMED as to appellee Dykes; and that this cause be and the same is hereby REMANDED as to appellee Tiller to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that costs be taxed against appellant as to appellee Dykes only and costs be taxed against appellee Tiller as to appellant Fludd only; said costs to be taxed by the Clerk of this Court.

Entered: January 17, 1989
For the Court: Miguel J. Cortez, Clerk
By: Karleen McNobb
Deputy Clerk

ISSUED AS MANDATE: APR 10 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 87-8244

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WILLIE ALBERT FLUDD,

Plaintiff-Appellant,

versus

J. B. DYKES, Sheriff of
Richmond County, Georgia and
FRANK TILLER,

Defendants-Appellees.

---

Appeal from the United States District Court
for the Southern District of Georgia

---

*ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC*

(Opinion January 17, 11 Cir., 1989, ___ F.2d ___).

(March 31, 1989)

Before TJOFLAT and EDMONDSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active

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*Honorable John Minor Wisdom, Senior U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
United States Circuit Judge

Supreme Court, U.S.
FILED
JUL 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2088

In The

# Supreme Court of the United States

October Term, 1988

FRANK TILLER,

*Petitioner,*

vs.

WILLIE ALBERT FLUDD,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether inquiry pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) may be made by the district court of the official County Attorney representing the Petitioner-Defendant Deputy Sheriff, where there has been a *prima facie* showing that the County Attorney based peremptory challenges on the race of the Plaintiff-Respondent in his claim for violation of constitutional rights?

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No. 88-2088

In The

# Supreme Court of the United States

October Term, 1988

FRANK TILLER,

*Petitioner,*

vs.

WILLIE ALBERT FLUDD,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Willie Albert Fludd opposes the Petition for Writ of Certiorari of Petitioner Frank Tiller.

## STATEMENT OF THE CASE

### I. Jurisdiction and Parties

The Petition for Writ of Certiorari was received June 23, 1989.

The Plaintiff below and Respondent herein is Willie Albert Fludd. Plaintiff was represented by John P. Batson and Sam G. Nicholson. The Petitioner, Frank Tiller, was sued individually and in his official capacity as an officer

with the Richmond County Sheriff's Department. The Sheriff of Richmond County, James Beck, an elected county officer, was named as a Defendant in his individual and official capacity in this claim pursuant to Title 42 U.S.C. § 1983 for violation of Plaintiff's fourth and fourteenth amendment rights. The Defendants were represented by the official County Attorney, Robert C. Daniel, Jr.

## II. Statement of Facts

### Discriminatory Strikes

The facts regarding *voir dire* and striking procedure are accurately stated in the Court of Appeals decision, which is reprinted in the Petition for Certiorari as Appendix I. The portion of the decision relevant to a *prima facie* showing of a *Batson v. Kentucky*, 476 U.S. 79 (1986) violation is at A5-6.

The panel opinion inappropriately concluded that "Appellant's proof failed to satisfy the *Swain* [*v. Alabama*, 380 U.S. 202 (1965)] standard . . . ." A17. No proof was offered or considered by the district court beyond the *prima facie Batson* proffer, whether in the nature of *Swain* or *Batson* evidence, because the district court rejected the applicability of *Batson* to civil cases. (A6; 1SR3-5, 6).

### Incident from which Case Arose

The statement of facts in the Court of Appeals decision about the incident from which this case arose is sufficient to consider the question presented. A5.

## III. Decisions of the District and Appellate Courts

The representations of the decisions below by Petitioner are accurate with the exception of stating that the Court of Appeals "determined that all of the other allegations of error made by the respondent were without merit." Petition for Certiorari at 3. The decision in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989) did not address Plaintiffs-Respondent's objections to charge on fourth amendment grounds carried forward by appeal. The position taken in objection was recently affirmed in *Graham v. Connor*, ___ U.S. ___, 57 U.S.L.W. 4513 (May 15, 1989).

The issue raised on appeal challenged the district court's failure to give a fourth amendment charge, or in giving a charge which did not reflect appropriate fourth amendment principles. Brief of Appellant at 33, *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989). (No. 87-8244).

The district court found the case should only go to the jury on a fourteenth amendment claim. (1SR3-424). In charging the jury the district court required that the force be "grossly disproportionate . . . and intentional . . . ." (1SR3-457, 458, 460). The district court charged that the jury's decision must be "based on his [the Defendant-Petitioner's] state of mind." (1SR3-463).

Although counsel did not articulate the precise admonition of the language in *Graham v. Connor*, ___ U.S. ___, 57 U.S.L.W. 4513, 4517 n.11 (May 15, 1989) against applying the factors of *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973) in a "talismanic fashion", counsel stated the substance of such an objection. (1SR3-470). Further, counsel submitted an appropriate charge. ("[A]n officer is entitled to use such force as a

reasonable person would think is required . . . .") (Plaintiff's Charges, Unreasonable Force).

On appeal Plaintiff-Respondent argued that charging the *Johnson* factors as elements was error. "The three elements approach [of the *Johnson* factors by] . . . the District Court required proof of specific intent or grossly excessive force, instead of just excessive force . . . ." (Brief of Appellant at 33, *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989). (No. 87-8244).

The panel opinion in *Fludd* does not address the challenged charge or lack thereof. Denial of the rehearing was entered on March 31, 1989. This Court issued its opinion in *Graham v. Connor, supra*, on May 15, 1989.

Respondent's counsel will address this issue pursuant to FED. R. CIV. P. 60(b)(6) by motion with the district court. *Ritter v. Smith*, 811 F.2d 1398, 1400-05 (11th Cir. 1987); *Gaines v. Dougherty County Board of Education*, 775 F.2d 1565 (11th Cir. 1985).

## REASONS FOR DENYING THE PETITION

### I. Although *En Banc* Rehearing in *Edmonson*, Still No Decision In Conflict with Application of *Batson v. Kentucky* to Civil Cases Requiring Rule 17.1(a) Review.

Although on June 19, 1989, the *en banc* Fifth Circuit heard oral argument in rehearing *Edmonson v. Leesville Concrete Company*, 860 F.2d 1308 (5th Cir. 1988) (prohibition against court's imprimatur of the discriminatory use of peremptory challenges applies in all civil cases), Peti-

tioner has presented no case in conflict with *Fludd v. Dykes, supra,* which meets Rule 17.1(a) standards.

## II. Petitioner's Asserted General Grounds Insufficient to Grant Certiorari under Rule 17.1(c).

In the Petitioner's Brief at pages 7-19 he argues a patchwork of authority to assert a general ground for granting the Petition pursuant to Rule 17.1(c). The nature and tenor of his argument why *certiorari* should be granted on the issue of whether *Batson* applies to civil cases is best portrayed by his own words.

> [I]n civil cases a litigant's due process right to the assistance of counsel and the attorney's right to pursue his calling and his First Amendment rights of personhood, privacy and freedom of speech and association mandate that the *Batson* decision be held inapplicable to such proceedings. *Any expectancy that a party has in a money judgment or in injunctive relief cannot possibly override such fundamental interests on the part of his adversary and his adversary's attorney.* Such a weighing of opposing interests is particularly appropriate when it is considered that peremptory strikes have traditionally been exercised in a manner solely within the discretion of respective counsel and that they are not a constitutionally mandated component of jury selection in civil cases in any event.

Petition for Certiorari at 18 (citations omitted) (emphasis added).

The Petitioner's argument guts the principle that the judicial system is to be fair to both parties. Essentially he argues for gunslinger justice in which the judge and the rule of law play no active part to insure the draw is fair. Further, the Petitioner's citation of *Swain v. Alabama,* 380

U.S. 202 (1965), partially overruled in *Batson v. Kentucky*, 476 U.S. 79 (1986); and *Hayes v. Missouri*, 120 U.S. 68 (1887) to support the argument, is incorrect. These cases do not hold that the fourteenth amendment does not apply to civil cases, claims for money or constitutional claims. Instead, they stand for the *Shelley v. Kraemer*, 334 U.S. 1 (1948) line of reasoning that courts ought to affirmatively use their power and procedure in a manner fair to both parties, as prescribed by the constitution. The Eleventh Circuit followed this reasoning in the case at bar.

The bulk of the Petitioner's argument asking this Court to grant *certiorari* is based upon a general truth that the use of peremptory strikes is important to our judicial system. However, the importance of peremptory strikes alone does not justify assertion of this Court's *certiorari* discretionary jurisdiction.

The false premise of the Petitioner's position is that in civil litigation, one party and his or her attorney should be left alone to his or her devices, and thus fairness, as embodied by the fourteenth amendment, is relegated to a secondary position. The Petitioner's argument is wholly insensitive to the idea that the judicial branch of government should provide a forum in which each party is treated fairly and not subjected to unequal treatment on prohibited grounds. If not used fairly, a peremptory strike becomes the Achilles heel which effectively nullifies every law and constitutional principle ever mandated. Given the context of this constitutional claim by a minority against an agent for the state, accepting the Petitioner's position would leave no buffer between a citizen's constitutional rights and government abuse.

Nowhere does the Petitioner cite any authority from this Court or any circuit court which has arguably addressed the conflict between the Petitioner's contrived due process and first amendment theory as a whole, with the principle of a fair judiciary. Rather, Petitioner has amassed a number of cases and their principles to proffer a theory untested in the context of the issues of this case. Moreover, the Petitioner presented no cases affirmatively preventing a counsel from having to explain the use of his or her strikes. For example, Petitioner cited *Martin v. Lauer*, 686 F.2d 24 (D.C. Cir. 1982), and although it dealt in general with attorney-client communication, the case is inapposite in the context of the discriminatory use of strikes.

The Petitioner further asserts that any inquiry into the jury selection process is forbidden, but this contention contravenes the well-established role of the court to oversee the entire trial including the jury selection process. The Petitioner's argument renders the constitution and principles of a fair judiciary subservient to one litigant's attorney-client privilege and his counsel's "personhood." What appears to be at the heart of the Petition is the "risk [of] being labeled a bigot or a fraud or both." Petition for Certiorari at 13.

Procedurally this case is not ripe to address the substance of the objections to a possible *Batson* inquiry. The Petition reads as if there had been a *Batson* inquiry in the district court and the Petitioner or his attorney had lodged certain objections or asserted a privilege and refused to answer the inquiry. However, there is no record from which to evaluate the Petitioner's argument either on the facts, or in the courts' rulings.

While peremptory strikes are admittedly a critical stage in the judicial process, the general grounds and lack of development of the record on these novel, general grounds asserted by the Petitioner are not sufficient to cause the writ to be issued pursuant to Rule 17.1(c). Either courts are to follow the fourteenth amendment or they are not.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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